United States - Anti-Dumping Measures on Steel Plate from India

WT/DS206

Oral Statement of the United States
First Meeting of the Panel

January 23, 2002

1. Mr. Chairman, members of the Panel, on behalf of the United States delegation, I would like to thank you for providing this opportunity to comment on certain issues raised by India in its First Written Submission. We do not intend to offer a lengthy statement today; you have our written submission, and we will not repeat all of the comments that we made there. We will be pleased to receive any questions you may have at the conclusion of our statement.

2. Mr. Chairman, before beginning, I want to comment briefly on India's new claim with respect to "special circumspection." In light of the Panel's ruling that it will not consider this claim, and in light of the fact that we have not seen these arguments before, we will not today respond in detail. However, for the record I want to note that the U.S. authorities did, in fact, corroborate the offer. Also for the record, we wish to note that we contest and disagree with the factual and legal arguments India has made today regarding the new claim.

3. I would like to emphasize at the outset a few points regarding the standard of review under Article 17.6 of the AD Agreement. First, panels may not conduct *de novo* evaluation of the facts. Unless a panel finds that the authorities' establishment of the facts before it was improper, or that their evaluation of those facts was biased and unobjective, the evaluation should not be overturned, even if the panel would have reached a different determination had the

same facts been before it in the first instance. (1st U.S. sub., ¶61 -¶66).

4. Second, panels must uphold the investigating authorities' interpretations of the AD Agreement if those interpretations are permissible. Where there are several permissible interpretations of an AD Agreement provision, a panel must not impose its preferred interpretation on the Member concerned. To do so would be to add impermissibly to the obligations to which the WTO Members have agreed. (1st U.S. sub., ¶67 -¶73).

5. The central issue in this case relates to the U.S. authorities' reliance on facts available – as provided for in Article 6.8 and Annex II of the AD Agreement – in its anti-dumping investigation of steel plate imports from India.

6. The AD Agreement provides that Members have the right to impose remedial duties if dumped imports are injuring their domestic industry. To invoke that right, a Member must first conduct an investigation to determine if dumping and injury exist. That dumping investigation, as prescribed by the AD Agreement, requires a great deal of information, most of which can only be obtained from the exporters. The position advocated by India in this case would place respondent exporters in total control of what data is used in the dumping calculation and make a meaningful investigative process impossible. Such an interpretation of the AD Agreement is, therefore, inconsistent with its object and purpose.

7. In contrast, the United States' interpretation of the AD Agreement is consistent with its object and purpose and preserves the balance of rights and obligations it establishes. Specifically, it is the view of the United States that, consistent with the AD Agreement, an investigating authority may determine that an exporter's response is so substantially flawed that it cannot form a reliable basis for a dumping calculation. In such a case, rejection of the entire

response is warranted. The case now before you is such a case.

8. Article 6.8 of the AD Agreement provides that, in such circumstances, "preliminary and final determinations . . . may be made on the basis of the facts available." In this case, the U.S. authorities relied on the facts available only after 1) providing numerous opportunities and making extensive efforts to assist the Indian respondent to provide usable data; 2) advising the Indian respondent repeatedly and specifically that the use of facts available would be required if it did not provide the necessary information; and 3) fully explaining its reasons for using facts available in its published determinations. In short, the U.S. authorities' reliance on facts available in this case complied with Article 6.8 and Annex II of the AD Agreement.

9. As the Appellate Body stated in the *Japan Hot-Rolled* case, the goal of an anti-dumping investigation is "ensuring objective decision-making based on facts." But in order for investigating authorities to *make* objective decisions based on facts, they must have *access* to those facts. The goal of an anti-dumping duty investigation is frustrated when a responding party does not provide the necessary information. As a result, the AD Agreement's authorization to use facts available when the necessary facts are not provided is absolutely essential to the ability of an investigating authority to conduct an anti-dumping investigation.

10. The purpose of the objective standard for decision-making is to permit neutral determinations to be made without bias toward either the party that could be subject to duties or the party being injured by any dumping. When investigating authorities rely on facts available, it is not possible to determine whether those facts are advantageous to the responding party because the information necessary to determine that party's actual margin of dumping is not available. Thus, an interpretation of the AD Agreement that would allow responding parties to selectively

provide information and yet require investigating authorities to use that information regardless of how incomplete it is, would encourage selective responses and defeat the underlying purpose of an investigation, to ensure "objective decision-making based on facts."

11. India is seeking just such an interpretation in this case. India is asking the Panel to require the U.S. authorities to use some – but not much – of the information submitted by the Indian respondent because – in India's view – this information was good enough to be used. But the U.S. authorities could not – and the Panel should not – focus on just a fraction of the information before it and ignore the rest of it. India and the Indian respondent concede that the home market sales, cost of production, and constructed value information that the Indian respondent supplied was completely unusable. And yet, India claims that the AD Agreement required the U.S. authorities to use the U.S. pricing information that the respondent did provide to calculate an anti-dumping margin, notwithstanding that this data itself also was flawed and represented only a fraction of the information necessary for an anti-dumping analysis.

12. Article 31 of the Vienna Convention provides that a treaty provision shall be interpreted in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose. India's arguments are not based on the actual text of Article 6.8 and Annex II of the AD Agreement, but on terms that India would have this Panel read into the Agreement. For example, India agues that Annex II, para. 3 creates obligations with respect to "categories" of information, even though the term "categories" does not appear in the text. Similarly, India argues that Annex II, para. 3 addresses what types of information authorities "must use," when in fact it only addresses what they "should take into account." As we discuss in our First Written Submission, at paragraph 88, adopting India's interpretation would lead to absurd results. Panels

should disfavor such interpretations.

13. India's interpretation is also contrary to the object and purpose of the AD Agreement in that it effectively undermines the ability of an investigating authority to take action to offset injurious dumping. Stripped to its essence, India's argument is that the AD Agreement permits respondents to provide only that information that supports their interests, and requires investigating authorities to use that information. If India's argument were credited, no respondent would ever submit information detrimental to its interests. If its home market prices or its costs of production were high, it would never provide a home market sales database or a cost submission. Conversely, if its export prices were low, it would never submit those export sales. The AD Agreement would be seen as providing for and protecting such behavior. There is no basis for such an interpretation in the text of the AD Agreement. The role of this Panel is to interpret the language actually used in the AD Agreement, not the language that India wishes were used.

The Information Necessary for an Anti-Dumping Investigation

14. At the center of this dispute is the meaning of the term "information" as used in Article 6.8 and Annex II of the Agreement. The word "information" is a general term and its interpretation depends on its context. Article 6.8 of the AD Agreement states that an investigating authority may apply facts available in its anti-dumping calculations if parties fail to provide "necessary" information. In the context of the AD Agreement, which defines dumping based on a comparison of the export price with the normal value, in the ordinary course of trade, the "necessary" information for conducting an anti-dumping investigation includes prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject

merchandise, and, in appropriate circumstances, cost of production information and constructed value information.

15. Like most investigating authorities, those in the United States are highly dependent on a respondent to provide the information necessary for an accurate and reliable anti-dumping analysis; they cannot force a respondent to provide the information. But while investigating authorities cannot control the quantity or quality of information provided by a respondent, they can – and must – assess the facts of each case to determine whether a respondent has supplied the necessary information that allows the investigating authority to carry out its analysis in an accurate manner. At times, a respondent may provide all of the necessary information, save minor instances in which the data is unavailable or outside of its control. At other times, a respondent may refuse to supply information altogether.

16. In the case of the Indian respondent, the information that it did provide was completely unusable. Even after the U.S. authorities gave the Indian respondent multiple opportunities to cure deficiencies, the information submitted remained completely unusable. Despite the fact that the U.S. authorities issued their standard questionnaire and at least five major supplemental requests for information, at the time the Final Determination was due, the U.S. authorities were still missing information they had requested of the Indian respondent more than six months earlier. (1st U.S. Sub. 150-155). Furthermore, when the computer databases provided by the Indian respondent proved unworkable, U.S. Department of Commerce staff made extensive efforts to assist the Indian respondent in addressing the deficiencies, but to no avail. (1st U.S. Sub. 24, 29). The Indian respondent insisted that its information could be verified with its own books and records but – after a careful on-site examination – this proved not to be the case. Even

the U.S. sales data upon which the Indian respondent – and now India – relies had flaws and was of no use standing by itself. In the end, the Indian respondent did not provide the information necessary for the U.S. authorities to accurately conduct an anti-dumping analysis. The authorities were required to analyze the necessary information but were prevented from doing so. At some point, when a responding party fails to provide the information necessary for conducting an antidumping investigation, investigating authorities must have the ability to reject that party's questionnaire response in its entirety and use the facts available.

17. The decision to rely entirely on facts available is not always necessary. In cases in which a small amount of necessary information is missing or cannot be used, the investigating authority can determine a fairly accurate anti-dumping margin by applying "facts available" in a correspondingly limited manner. However, in cases such as this one, in which a substantial portion of the necessary information is either missing, unusable, or unverifiable, a respondent cannot change the overwhelming, collective flaws in the information by merely breaking up the information into pieces and then asking the authority to focus on individual pieces or "categories" of information. Investigating authorities must review <u>all</u> of the necessary information in such a case before determining how to apply the facts available. The European Communities has stated in its submission that "data requested in an anti-dumping investigation, and which is necessary for a determination, cannot be seen as isolated pieces of information." (EC Third Party Sub. ¶ 10.) We agree entirely.

18. Article 6.8 and Annex II of the AD Agreement provide the parameters in which investigating authorities may determine whether the specific facts presented require the application of facts available. India's interpretation of Article 6.8 and Annex II of the AD

Agreement seeks to narrow the parameters in which "facts available" may be applied and, thereby, significantly restrict an investigating authority's ability to conduct an anti-dumping investigation. India's interpretation would upset the careful balance between the interests of investigating authorities and exporters that is reflected in the AD Agreement.

19. In this case, the U.S. authorities' decision to apply facts available with regard to the Indian respondent is consistent both with the relevant provisions of the AD Agreement and with this essential balance between the interests of investigating authorities and exporters. As the Appellate Body recently explained in *Japan Hot-Rolled*, at para. 102:

> In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort - to the "best of their abilities" - from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.

The factual evidence demonstrates that the U.S. authorities did not insist upon absolute standards or impose unreasonable burdens upon the Indian respondent. They did not insist on perfection nor did they ask for information that the Indian respondent did not control. But left without the information necessary for an anti-dumping determination, the U.S. authorities had no alternative to the use of facts available.

20. In sum, if the Panel were to adopt the interpretation of "information" that India seeks to graft onto the AD Agreement – one that applies the facts available criteria of Article 6.8 and Annex II to one "category" of information but ignores the collective absence of the information

necessary for an anti-dumping analysis – responding parties would be given ultimate control over what information investigating authorities may analyze, contrary to the essential balance between the interests of investigating authorities and exporters that is reflected in the AD Agreement.

India's Challenge to the U.S. Statute

21. I'd like to turn now briefly to discuss India's claim that the facts available provisions in U.S. law "as such" violate WTO obligations. It is well-established under WTO practice that a Member's legislation "as such" can violate WTO obligations *only* if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations.

22. As we explained in considerable detail in our First Written Submission (at paras. 120 – 146), nothing in the U.S. statutory facts available provisions mandates WTO-inconsistent action. On the contrary, the U.S. provisions largely mirror the AD Agreement and, where differences exist, U.S. law does not conflict with the principles and criteria set forth in the Agreement.

The Article 15 Claim

23. I will briefly discuss India's claim that the United States violated Article 15 of the AD Agreement by allegedly failing to explore the possibilities of constructive remedies during the anti-dumping investigation. As the European Communities noted in its submission (at ¶ 13), Article 15 only applies where a developing country Member demonstrates that its "essential interests" would be affected by the imposition of anti-dumping duties on the product at issue. India never even claimed – much less demonstrated – that its "essential interests" would have been affected by the imposition of anti-dumping duties on SAIL's exports. In addition, the facts demonstrate in any event that the U.S. authorities did actively explore the possibility of a price

undertaking in this case. India's claims to the contrary fail to establish a *prima facie* case of inconsistency with Article 15.

New Information

24. We would also like to comment briefly on India's reliance on testimony that was not presented to Commerce and, thus, is not part of the facts made available to the investigating authority. We explained in our First Written Submission, at paragraphs 168-171, why considering such material would be inconsistent with Article 17.5(ii) of the AD Agreement, which requires that panels examine the matter before them based upon the facts made available to the authorities of the importing Member.

25. Today's presentation by Mr. Hayes only proves our point. Mr. Hayes is an employee of the law firm that is representing India in this proceeding. And, with respect, his views are those of an advocate, not those of a disinterested expert. His comments should be taken in that light. Mr. Hayes' views were not part of the facts made available to Commerce, and they are not properly part of the record for the Panel's review. The affidavit in question was never submitted to, and therefore never considered by, Commerce in making its final determination. As an employee of the law firm which currently represents India, Mr. Hayes was never involved in the challenged investigation and his arguments, which do not appear on the record, have been created two years after Commerce's final determination. Thus, his views are neither timely, nor objective. In addition to declining to consider this information, the Panel should also decline to consider any arguments provided by India which rely upon this information.

26. We would also note that, contrary to the suggestions of India at paragraph 85 of its oral statement, while the United States has not engaged on the substance of the new information

presented by Mr. Hayes, the United States has in no way conceded any of his points.

Conclusion

27. Our purpose today was to focus on the primary fundamental issue before the Panel: that investigating authorities must be permitted to carry out their responsibilities in a fair and unbiased manner and should not be required to conduct their anti-dumping analyses in a manner determined by the respondent. This principle is supported by the text of Article 6.8 – which authorizes the use of facts available – and by the criteria of Annex II. When, as in this case, a respondent has substantially failed to provide the information necessary for an anti-dumping analysis, investigating authorities are authorized by Article 6.8 to reject the limited information supplied and apply instead the facts available.

28. This concludes our presentation today. Rather than respond further to the particular comments made by India on a point-by-point basis at this time, we would welcome the opportunity to address areas of concern or interest to the Panel in response to questions. Thank you.